UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

C.J. FITZHARRIS, Appellant, vs. HERMAN TAPIA, JR., Appellee.	No. 21073

APPELLANT'S BRIEF

Appeal from the United States
District Court for the Northern
District of California
Southern Division

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JURISDICTION

The jurisdiction of the United States District Court to issue the writ of habeas corpus is conferred by Title 28, United States Code, section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code, section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal by C.J. Fitzharris, Superintendent of the California Training Facility at Soledad, California, respondent in the court below and custodian of appellee, Herman Tapia, Jr., from an order of the United States District Court for the Northern District of California,

Southern Division. That order granted appellee's application for a writ of habeas corpus and directed that he be discharged from the custody of appellant. In issuing its order, the District Court rejected appellant's contentions that appellee Tapia is precluded from relief by reason of his failure to exhaust available state remedies and his deliberate bypassing of state remedies, and held that appellee was denied the right to counsel within the meaning of Escobedo v. Illinois, 378 U.S. 478 (1964), even though he had at no time requested counsel and further held that appellee was not precluded from relief because no retroactivity problem was present.

Proceedings in the State Courts

In an information filed by the District Attorney of Los Angeles County, appellee was charged with burglary in violation of California Penal Code section 459. Trial commenced on June 22, 1964. A jury verdict finding appellee guilty of second degree burglary was returned on June 24, 1964. Probation was denied, and on August 4, 1964, judgment was entered sentencing appellee to state prison for the term prescribed by law.

There was no appeal from the judgment of conviction. In November, 1964, and March and May, 1965,

appellee filed for writs of habeas corpus in the state courts. Separate applications were filed in San Bernardino County Superior Court, the District Court of Appeal for the First Appellate District and the California Supreme Court. Each application was denied without hearing or opinion. In each of the foregoing applications for habeas corpus, appellee raised the issues which were presented to the court below.

Proceedings in the Federal Courts

On June 15, 1965, appellee filed an application for writ of habeas corpus with the United States District Court for the Northern District of California, Southern Division. On the same date, an order to show cause issued directed to appellant. Appellant's return to the order to show cause was filed July 20, 1965. On August 10, 1965, appellant filed a supplement to the return to order to show cause. Appellee, acting in propria persona, filed a traverse. On August 31, 1965, the District Court appointed appellee's present counsel, John Mallick, to represent him.

On November 23, 1965, appellee filed a motion for an evidentiary hearing and the same day an order issued directing that the hearing be held on December 10, 1965.

On June 7, 1966, the District Court entered

an order directing appellee's discharge from custody. On June 20, 1966, appellant filed notice of appeal to this Court.

STATEMENT OF FACTS

On April 14, 1964, Officers Nicholl and Senneff of the Los Angeles Police Department visited appellee at his home and questioned him concerning a burglary (*RT 4, 5, 19).

The conversation took place in the living room of appellee's home (RT 12). Shortly after the officers arrived, appellee's father entered the house and remained therein during the remainder of the conversation (RT 22-23, 26, 32). During this conversation, appellee admitted participating in the burglary of which he was subsequently convicted (RT 20-21). The conversation was friendly, and the statements made by appellee were free and voluntary, not induced by threats or offers of reward (RT 21, 23-24, 30-31, 33, 35-36), and the District Court so found (District Court order, pp. 3-4).

At no time did appellee request to see an attorney (RT 24, 32-33). He was not advised that

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*"RT" refers to the Reporter's Transcript of the evidentiary hearing conducted in the court below on December 10, 1965.

he had a right to see an attorney, nor was he advised of his right to remain silent or that anything he said could be used against him (RT 7-8, 24). Appellee was not so advised because "at this time there was no department policy to this effect, and we had not at that time been so advising arrestees." (RT 24: 14-16).

The statements made by appellee were introduced without objection against him in the trial court proceedings.

Appellee was informed in writing by his trial counsel of the availability of appeal, the procedure to be followed in perfecting an appeal, the time within which the notice of appeal should be filed, that his counsel would not file an appeal but that he was free to do so, that he was entitled to appointed counsel on appeal and transcripts at no expense (RT 16; Respondent's Exhibit "A"). There was no appeal from the judgment of conviction.

SUMMARY OF APPELLANT'S CONTENTIONS

I. The District Court failed to consider the effect of appellee's failure to appeal.

II. The effect of appellee's failure to object in the state court proceedings was not considered by the district court.

III. The District Court erred in holding that appellee was denied the right to counsel within the meaning of the Escobedo decision even though there was no request for counsel.

IV. The District Court erred in holding that appellee was not precluded from relief because no retroactivity problem was present.

ARGUMENT

I

THE DISTRICT COURT FAILED TO CONSIDER THE EFFECT OF APPELLEE'S FAILURE TO APPEAL.

Appellee was informed by letter from his trial counsel of the availability of appeal, the procedure to be followed in perfecting an appeal, the time within which his notice of appeal should be filed, that his counsel would not file an appeal in his behalf but that he was free to do so, that he was entitled to have counsel represent him on appeal, and the Reporter's Transcript and Clerk's Transcript would be made available at no expense to him (Respondent's Exhibit "A").

Despite the knowledge of the availability of appeal, as indicated by appellee in his habeas corpus application, no appeal was taken from the judgment of conviction. In seeking relief in the Court below, appellee did not explain his failure to appeal. He is

thus attempting to use the federal courts as a substitute forum in which to litigate a federal question which should properly have been raised in the California courts.

Appellee's failure to appeal in this context brings into operation the two separate doctrines of (1) whether he deliberately by-passed available state remedies and (2) if he has under California state law an excuse for not appealing from which relief will be granted, whether he has exhausted available state remedies. We realize that this places the habeas applicant such as appellee on the horns of a dilemma but appeal, after all, is the ordinary procedural vehicle for the correction of trial court errors.

Although both issues of waiver and failure to exhaust available state remedies were raised by appellant in the court below, they were rejected without comment in the court order directing appellee's release.

Under the doctrine of Fay v. Noia, 372 U.S. 391 (1963), in determining whether appellee is precluded from relief on the grounds of waiver, the issues became (1) whether the State of California has provided petitioner with an orderly remedy by which to vindicate his asserted constitutional right, and (2) whether petitioner made a considered choice to abandon the privilege of seeking to vindicate that federal right in the state courts.

Fay v. Noia, supra at 439; Gladden v. Gidley, 337 F.2d 575, 579 (9th Cir. 1964); see Richardson v. Oliver, Civ. No. 9244 N.D.N.D. Cal., March 21, 1966.

In view of the letter from appellee's counsel and appellee's acknowledgment that he was fully aware of the procedure for perfecting an appeal as prescribed by Rule 31(a) of the California Rules of Court, few cases will present such clear evidence of "an intentional relinquishment or abandonment of a known right or privilege", Johnson v. Zerbst, 304 U.S. 458, 468 (1938), constituting a deliberate bypassing of a state remedy.

The California law is well settled that the writ of habeas corpus cannot substitute for an appeal. In re Lessard, supra, 62 Cal.2d 497, 505 (1965); In re Waltreus, 62 Cal.2d 218, 225 (1965); In re Mitchell 56 Cal.2d 667, 671 (1961); In re Winchester, 53 Cal.2d 528, 532 (1960); In re Dixon, 41 Cal.2d 756, 759 (1953); In re Lindley, 29 Cal.2d 709, 722 (1947). In that petitioner sought to present his contentions by habeas corpus without explaining his failure to pursue the remedy of appeal, he did not properly invoke an available state remedy, and hence, cannot be said to have exhausted it. Since he was fully aware of the availability of appeal and the procedures to be followed in perfecting it, his failure to appeal constituted a bypassing of

state procedures, fully justifying the California courts in refusing to entertain his claim. This action by the state courts is fully consistent with the doctrine of Fay v. Noia, supra. As pointed out in Townsend v. Sain 372 U.S. 293, 317:

> "The standard of inexcusable default set down in Fay v. Noia . . . . does not sanction needless piecemeal presentation of constitutional claims in the form of deliberate by-passing of state procedures."

In light of the nature of claims sought to be presented by petitioner, it is significant to note that the time within which he could have perfected an appeal did not expire until nearly two months after the decision was rendered in Escobedo v. Illinois, supra, 378 U.S. 478 (1964). Under these circumstances "the burden should be upon the petitioner at the very outset to allege facts which if proven would excuse his failure to appeal." [Citations omitted] Richardson v. Oliver, supra at 6.

In that petitioner failed to allege facts excusing his failure to appeal and thereby further substantiated the lack of appeal as being a considered knowing and deliberate decision to bypass state procedures, he is precluded from relief in this Court. We submit that the Court below erred in failing to so hold.

In directing appellee's release, the District Court order ignores the question of whether appellee has exhausted available state remedies as required by Title 28, U.S.C., § 2254.

Judgment of conviction was entered against appellee on August 4, 1964. Under California State Law, to effect a timely appeal, notice of appeal should have been filed within ten days following rendition of the judgment. Rule 31(a), California Rules of Court. Appellee did not file notice of appeal and he has not shown that he attempted at any time to perfect an appeal from that judgment by seeking relief in the California courts from his failure to file a timely notice of appeal. A procedure is provided under Rule 31(a) of the California Rules of Court whereby persons seeking to reinstate their right to appeal may file affidavits with the court explaining their failure to file a timely notice of appeal. The California Supreme Court has shown liberality in interpreting this rule so as to grant relief in a number of cases where good cause has been shown. See e.g. People v. Davis, 62 Cal.2d 806 (1965).

The doctrine of Fay v. Noia, 372 U.S. 391 (1963) is consistent with holding that appellee's failure to pursue California procedures to seek relief from his failure to file a timely notice of appeal, constitutes a

failure to exhaust available state remedies. See Holley v. Cheuvront, 351 F.2d 615 (9th Cir. 1965); Gravette v. Maxwell, 340 F.2d 95 (6th Cir. 1965); Curtis v. Buchkoe, 336 F2d 32 (6th Cir. 1965). As Judge Sherrill Halbert pointed out in Richardson v. Oliver, supra, Civ. No. 9244 N.D.N.D. Cal., March 21, 1966, at pp. 3-4 of the Memorandum Opinion,

> "A state prisoner who failed to appeal from judgment of the trial court within the time allowed by law and who has a valid excuse for such failure, should as a matter of course pursue his statutory remedies in California before seeking relief in the federal courts. Nothing in the present record indicates that petitioner has availed himself of that remedy." [Footnote omitted].

We submit that until appellee pursues this remedy or demonstrates that such relief is not available to him, he has not exhausted state remedies that were available at the time his petition was filed and remain available at this time.

II

THE EFFECT OF APPELLEE'S FAILURE TO OBJECT IN THE STATE COURT PROCEEDINGS WAS NOT CONSIDERED BY THE DISTRICT COURT.

There was no objection to the introduction in

the trial proceedings of the evidence which appellee now contends deprived him of a constitutional right entitling him to release. It was earlier established in California law that, "A failure to object to the introduction of evidence which defendant alleges was illegally obtained precludes the successful presentation of the issue at the appellate level." In re Lessard, 62 Cal.2d 497,503 (1965); see also 3 Cal.Jur.2d, Appeal and Error, § 140 at 604; 4 C.J.S., Appeal and Error, § 228 at 665.

The fact that the decision not to object may have been a part of trial strategy - a decision not participated in by appellee, or if so, even objected to by him - would not relieve appellee from the requirement of pursuing state remedies to vindicate the alleged constitutional right. Nelson v. People of the State of California, 346 F.2d 73, 81 (9th Cir. 1965). See Henry v. Mississippi, 379 U.S. 443 (1965); Rhay v. Browder, 342 F.2d 345 (9th Cir. 1965). This is especially significant since appellee did not attack the competency of his trial counsel. Under these circumstances, the more obvious inference is that the failure to object was a tactical trial decision.

This failure to object to the introduction of the evidence when considered in connection with appellee's failure to appeal (see Argument I, supra) points it up as

being the first step in the process of deliberately bypassing available state remedies.

As we understand this Court's decision in Nelson v. People of the State of California, supra, California's contemporaneous objection rule serves a legitimate state interest, and a failure to invoke it may alone constitute deliberate bypassing of state procedures precluding a habeas applicant from relief in federal court. In analyzing Henry v. Mississippi, supra, this court stated in Nelson,

> "We think that Henry limits Fay v. Noia at least to this extent - that it stands for the proposition that counsel's decision, although made 'without prior consultation with an accused,' to by-pass the contemporaneous-objection rule as part of trial strategy, will nevertheless 'preclude the accused from asserting constitutional claims' (id. at 451, 85 S.Ct. at 569). Thus the broad language in Fay, to the effect that the decision (there, a decision not to appeal) must be the choice of the petitioner, and that a choice made by counsel, not participated in by petitioner, does not automatically bar relief, does not here apply." [footnotes omitted] 346 F.2d at 81.

The failure of the Court below to consider the

impact of appellee's non-compliance with California's contemporaneous objection rule on the question of deliberate bypassing resulted in the erroneous conclusion that appellee was entitled to release.

III

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLEE WAS DENIED THE RIGHT TO COUNSEL WITHIN THE MEANING OF THE ESCOBEDO DECISION EVEN THOUGH THERE WAS NO REQUEST FOR COUNSEL.

In the case at bar, appellee at no time requested to see an attorney. Despite this fact, the Court below held that he had been denied the right to counsel within the meaning of Escobedo v. Illinois, 378 U.S. 478 (1964), concluding that "in petitioner's case, his failure to request counsel was not fatal." (District Court Order, p. 6). In so concluding, we submit that the District Court erred.

The scope of the Escobedo decision was recently made clear by the United States Supreme Court holdings in Miranda v. Arizona, 34 U.S. L.Week 4521 (U.S. June 13, 1966), and Johnson v. New Jersey, 34 U.S. L.Week 4592 (U.S. June 20, 1966).

In passing upon the question of the retroactivity of Escobedo and Miranda, the court in Johnson v. New Jersey, delineated more precisely the import of Escobedo, stating,

"Apart from its broad implications, the precise holding of Escobedo was that statements elicited by the police during an interrogation may not be used against the accused at a criminal trial,

'[where] the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent. . . .' 378 U.S., at 490-491. . . . [emphasis added]

"As for the standards laid down one week ago in Miranda, if we were persuaded that they had been fully anticipated by the holding in Escobedo, we would measure their prospectivity from the same date. . . . disagreement among other courts concerning the implications of Escobedo however, have impelled us to lay down additional guidelines for situations not presented by that case. This we have done in Miranda . . . ." [footnote omitted] Id. at 4596-4597.

It is thus clear that there is a denial of the

right to counsel in the context with which we are here dealing only when all the requirements of the Escobedo holding are present, including a request and denial of the opportunity to consult with counsel.

The necessity of a request for counsel to invoke the protective shield of Escobedo is further illustrated by Miranda v. Arizona, supra. There, the court, in dealing with in custody interrogation, set forth procedural safeguards which are not dependent upon a request for counsel, and in other respects are more expansive than those announced in Escobedo. However, the principles announced in Miranda emanate from the privilege against self-incrimination contained in the Fifth Amendment of the United States Constitution, while Escobedo is based on the denial of the right to counsel within the meaning of the Sixth Amendment. During the course of the Miranda opinion, the court recognizes that,

> "A different phase of the Escobedo decision was significant in its attention to the absence of counsel during the questioning. . . . In Escobedo however, the police did not relieve the defendant of the anxieties which they had created in the interrogation rooms.

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Rather, they denied his request for the assistance of counsel, 378 U.S., at 481, 488, 491.[35/]" 34 U.S. L.Week at 4529.

Against this interpretive background, it seems hardly arguable that appellee can successfully assert that he was deprived of the constitutional right to counsel within the meaning of Escobedo v. Illinois, supra, 378 U.S. 478 (1964).

We therefore submit that the Court below committed error in so holding and respectfully urge that the order directing appellee's release be reversed.

IV

THE DISTRICT COURT ERRED IN HOLDING THAT APPELLEE WAS NOT PRECLUDED FROM RELIEF BECAUSE NO RETROACTIVITY PROBLEM WAS PRESENT.

Appellee's state trial commenced on June 22, 1964. The jury verdict of guilty was returned on June 24, 1964. The order of the Court below notes that the decision of Escobedo v. Illinois, supra, was rendered on June 22, 1964, and then states, "Since the verdict in this case was not even arrived at when

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"35/ The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake. [Citation omitted]."

the Escobedo decision was rendered, no 'retroactivity' problem exists in this case." (p. 4).

In so holding and ordering appellee's release, the Court below committed error requiring reversal.

Johnson v. New Jersey, supra, 34 U.S. L.Week 4592 (U.S. June 20, 1966) held that Escobedo and Miranda are to be applied only prospectively. The court was clear and explicit in specifying the dates beyond which Escobedo and Miranda do not apply.

> "We hold that Escobedo affects only those cases in which the trial began after June 22, 1964, the date of that decision. We hold further that Miranda applies only to cases in which the trial began after the date of our decision one week ago." Id. at 4593 [emphasis added].
>
> "All of the reasons set forth above for making Escobedo and Miranda non-retroactive suggests that these decisions should apply only to trials begun after the decisions were announced . . . .
>
> "At the same time, we do not find any persuasive reason to extend Escobedo and Miranda to cases tried before those decisions were announced, even though the cases may still be on direct appeal.
>
> . . .
>
> "In light of these additional considerations,

we conclude that Escobedo and Miranda should apply only to cases commenced after those decisions were announced. . . . Because Escobedo is to be applied prospectively, this holding is available only to persons whose trials began after June 22, 1964, the date on which Escobedo was decided." Id. at 4596.

After pointing out that Miranda established guidelines in addition to those set forth in Escobedo, the court states, "these guidelines are therefore available only to persons whose trials had not begun as of June 13, 1964." Id. 4597.

It is abundantly clear that even if appellee came within the holding of Escobedo v. Illinois, supra (which appellant does not concede, see Argument III, supra) he would not be entitled to relief since his trial commenced on the same date the Escobedo decision was rendered, June 22, 1964, and the benefits of that decision are only available to persons whose trials commenced after that date.

It is equally obvious that Miranda is not available to appellee since it applies only to cases in which the trials commenced after June 13, 1966.

Since this case does indeed present a retroactive problem of such magnitude that appellee is precluded from relief, we submit that the order of the court

below must be reversed.

CONCLUSION

For the foregoing reasons, appellant respectfully urges that the order of the District Court granting the writ of habeas corpus should be reversed.

Dated: July 12, 1966.

THOMAS C. LYNCH, Attorney General
of California

ROBERT R. GRANUCCI
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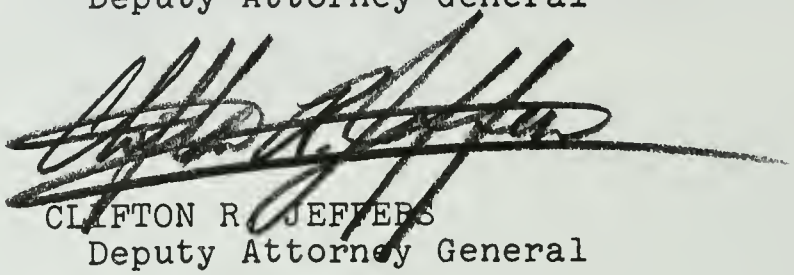

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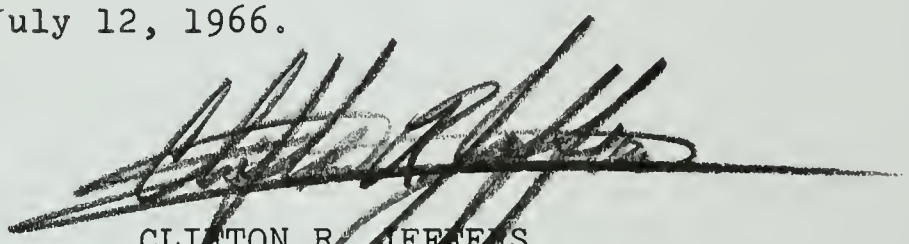
CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: San Francisco, California

July 12, 1966.



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